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MISCELLANEOUS:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1330

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC.,
and
NATIONAL RIGHT TO WORK COMMITTEE,
Petitioners,

v.

HONORABLE CHARLES R. RICHEY, DISTRICT JUDGE, AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,
Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT UNIONS

COUNTERSTATEMENT

This case arises from petitioners' repeated and continuing efforts to block a discovery order in a suit asking that the Right to Work Committee and Foundation be enjoined from using employer funds to encourage and finance suits against unions in violation of federal law. The challenged disclosure order of the

District Judge requires that under conditions of litigation confidentiality defendants furnish the identities of a sample of 190 among over eight thousand of their employer-contributors. Finding that such evidence "goes to the heart of this litigation" and that there is "no other reasonable way for plaintiffs to obtain the information sought," the District Court required its disclosure by an Order of June 5, 1974.

Defendants sought appellate review by appeal and mandamus. On June 28, 1974 the Court of Appeals dismissed the appeal, and on January 20, 1975 this Court denied review of that action (95 S. Ct. 817). On March 17, 1975 the court below dismissed the mandamus petition, and on April 14, 1975 this Court unanimously (Mr. Justice Douglas not participating) denied petitioners' request for a thirty-day stay to permit the filing of a petition for certiorari. Since that petition has nevertheless now been filed, we demonstrate for a third time before this Court that there is no plausible basis for petitioners' objection to furnishing facts having high materiality in the action. Quite naturally, our statement of the facts is similar to the statement in the opposition in the earlier "appeal" case, No. 74-645.

* * * *

This suit was filed in 1973 by ten labor unions and their affiliates against two national "right to work" groups financed by employers to attack union security and union organization. Plaintiffs assert that defendants are using employer money to encourage and finance "right to work" suits by dissident employees against their unions, in violation of the second proviso to Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C.

§ 401.[1] The discovery proceedings already conducted in this case give substance to that claim, and to the high materiality of the limited information plaintiffs seek regarding the identities of a sample of 190 among thousands of employer-contributors to the Right to Work Foundation's operations.

1. *The National Right to Work Committee.* The defendant National Right to Work Committee advertises itself as a "Coalition of Employees and Employers" (Larson deposition transcript in the District Court [hereinafter "tr."] 584-585). It was publicly launched in 1955 under the chairmanship of Edwin S. Dillard, a North Carolina manufacturer, with former Congressman Fred Hartley, Jr., as its President. The Committee announced its plan to fight various forms of union security arrangements and agreements (tr. 30-31). It is clear that the initial funding of the National Committee was from employers and business interests. Five of the six known Committee founders were employers or others affiliated with corporations and business entities (Plaintiffs' Answers to Set Number One of Interrogatories by Defendants at Appendix E, pp. 3-5). Indeed, defend-

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[1] "No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: . . . *And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition*" (emphasis added).

ants have admitted that as late as 1973 the sum of $840,546—*representing 84% of the Committee's proposed $1 million budget for that year* (tr. 316)—came to the Committee in contributions from corporations, businesses, and other employers (Defendants' Response to Plaintiffs' Set Number III of Interrogatories, answer 7(c)). The Committee has long advertised to its donors the business deductibility of their contributions (Larson Deposition Plaintiffs' Exhibits Nos. 51 and 52).

From the beginning, the National Committee's operations were directed to propaganda campaigns, lobbying, film distributions, speeches to employees, and other public activities advancing the interests of the funding employers to inhibit or eliminate the union shop, the agency shop, the checkoff, and other forms of union-dues support. In the mid-1960s the Committee added litigation as a weapon in its arsenal (tr. 764, 765, 787, 790, 839, 842-843). Several major suits, some fomented and all of them funded by the Committee, were filed at that time by employees against their unions, challenging agency shop agreements between the union and the employer and particularly challenging the use of their union payments for political activities (*id.*). Among these Committee-financed union security challenge suits were *Reid* v. *McDonnell Douglas Corp.*, which was ultimately dismissed (*Reid* v. *Automobile Workers*, 479 F.2d 517 (C.A. 10 (1973)), cert. denied, 414 U.S. 1076), and *Seay* v. *McDonnell Douglas Corp.*, which has also been dismissed (85 LRRM 2007, Dist. Ct., C.D. Calif., 1973). In 1968 the Committee decided to enhance its litigation function by creating a tax-exempt litigating arm which would obtain charitable deductibility status

under Section 501(c)(3) of the Internal Revenue Code. Accordingly, by a 1968 resolution of the Committee's Board of Directors, there was created the "National Right to Work Legal Defense and Education Foundation, Inc." Nine of the eleven members of the Foundation's Board of Trustees are also on the Board of Directors of the Committee (tr. 69), and the two organizations are run from the same offices by the same executive director, Mr. Reed Larson (tr. 78, 80-82, 85).

2. *The National Right To Work Foundation.* Since its inception, the defendant Foundation has financed some 50 litigations throughout the United States by employees and union members against their unions, challenging the legality of various forms of union security and union support requirements contained in contracts and agreements with employers (tr. 753, 818). The few examples given by petitioners (Pet. 5) of the types of cases in which they provide the financing are far from representative. Of some fifty cases they are funding, *only* the *Sidberry* case alleges racial discrimination, and only two (including *Richardson*) allege an assault or other form of physical violence. By contrast, seven challenge union use of dues or agency fees for political purposes; twenty-eight challenge the "union shop" requirement that employees pay dues or agency fees to the union; and six others challenge the union hiring hall or other means by which union members are allegedly given preference over other employees.

Hardly any of the Foundation's suits have succeeded, but the Foundation has steadily grown richer, attaining by 1972 an annual contributions level of $1,727,572 (Defendants' Answers to Set

Number I of Interrogatories by Plaintiffs, answer 1) and more recently to an annual level of $2,200,000. See *The Wall Street Journal,* April 22, 1975, p. 1., quoting Foundation officials. The Foundation has already conceded that $609,794.56 of its 1972 receipts appears on its records as having been given by 8,361 employers (Defendants' Answers to Set Number II of Interrogatories by Plaintiffs, answers 2(a) and 2(c)). Actually, plaintiffs believe and intend to show upon further discovery that the employer portion of the Foundation's annual contributions income is well over 50%, and indeed closer to the 84% employer support already conceded by defendants in the case of the Committee's annual income.

3. *The Complaint.* Employer financing, by and through the Committee and the Foundation, of a nationwide campaign of suits by dissident employees was deemed by the plaintiff unions who have suffered from that campaign a violation of the second proviso to Section 101(a)(4) of the Act. That proviso bars interested employers from *"directly or indirectly"* financing suits by union members against their unions. Accordingly, in 1973 plaintiffs instituted this action, whose first claim seeks an injunction against the continued contribution of financial support by interested employers through the defendant Committee and Foundation to suits by union members challenging union support requirements.

4. *Initial Proceedings Below.* Defendants moved to dismiss the Complaint on a variety of grounds, including objections to the jurisdiction of the Court and a claim that the "interested employer" ban of the Act applies only to the immediate employer of the employee who is suing his union. Plaintiffs opposed the motion,

contending that jurisdiction was clear under the specific terms of Section 102 of the Act. As to defendants' second point, plaintiffs demonstrated that both the language and the legislative history of the "interested employer" proviso repel defendants' "immediate employer" construction. Thus, the language of the proviso prescribes that with respect to "an action in any court, or in a proceeding before any administrative agency" brought by a labor organization member, *"no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition."* This language repels the defendants' limiting construction. If Congress intended to bar by the "interested employer" terminology only litigation support by the immediate employer of the union member instituting an action or proceeding, then it would have used different language apt to the purpose; it would have said simply that it was barring litigation support by an employer to his employees. But Congress did not do this and the words "interested employer" simply do not connote the narrow intention urged by defendants.

Moreover, there is dispositive legislative history on the Senate floor (see Pet., pp. 33A-38A), where the proviso was added to the Section 101(a) (4) text as offered by Senator McClellan. The original language of the proposed proviso, introduced by Senator Kuchel, stated that *"no employer or employer association"* could provide financing or encouragement to suits covered by the section. However, Senator Goldwater proposed that the "no employer" language be amended so as to bar financing only by any employer who has a "dispute, controversy, contract, connection,

or relationship of any kind in any area of activity, with the labor organization against which such action or proceeding has been or is being brought by such member." Senator Clark immediately objected that this might open up "an undesirable loophole," by permitting employers "who just did not like unions generally to finance the activities which they are forbidden to finance or encourage . . . " After further expressions of reluctance by the proponents of the proviso, Senator Goldwater persisted that even a loan from a personal friend of the employee, who happened to be an employer, was precluded by the "no employer" language, and Senator Mundt added that a loan from a bank would be similarly proscribed. To settle the matter, Senator Kuchel offered the compromise "interested employer" language, which was accepted by all. Senator Goldwater requested that "the proponents of this interesting word 'interested' " explain it in order "to make a legislative history" and Senator Allot asked whether the language as amended would "include 'any' employer? Let us assume that the employer is in the general grocery business. Would the word 'interested' include any other employer?" Senator Javits responded for the proponents:

> "I think it probably would if the litigation involved the union in the whole line of business . . . "

From this record, it is clear that far from confining the proviso's inhibition only to the immediate employer of the litigating employee, it was the intent of the Congress to permit employer financing of employees' suits against their unions only in rare and unusual cases, such as the personal friend or the bank loan situation where the contributing employer has no economic stake in the subject or the outcome of the union

member's suit. With this legislative history before him, on October 24, 1973, defendants' motion to dismiss was rejected by the District Judge.

5. *The Disclosures Sought.* On December 13, 1973, plaintiffs served the interrogatories which are the basis of the District Court's order of June 5, 1974, compelling disclosure. When disclosure was refused concerning employer contributions to the Foundation, on January 18, 1974, plaintiffs moved in the District Court for an order requiring defendants to reveal, under conditions of litigation confidence, the names of some 190 of the more than eight thousand employer contributors to the Foundation. These included 1) the names of any contributing employers among the 116 employers publicly and frequently listed by the Foundation in its brochures as the members of its "Business Advisory Council" and 2) 74 other employer donors' names — the 37 employers who each admittedly donated between $500 and $5000 in 1972, and another 37 taken at random from among employers who contributed less than that amount in 1972.

The function of these limited disclosures sought was made precise in plaintiffs' Memorandum Supporting Motion to Compel Answers to Interrogatories. Plaintiffs there pointed out that the central question for trial in this case is whether the employers admittedly contributing vast amounts annually to the Foundation's financing of suits by union members against their unions are "interested employers" within the meaning of the statute. Plaintiffs urged (at pp. 4-5) that the sample of contributing employers' names would enable plaintiffs to test and to demonstrate employer "in-

terest" along five separate lines of relevant inquiry into that question:

i. One key area of inquiry is whether the contributing employers include employers engaged in the same "lines of business" as the labor unions against whom the defendants are financing suits by dissident employees. As we have noted (supra, pp. 7-8), the legislative history of the "interested employer" clause of the statute makes clear that an employer in the same line of business would be an "interested employer." Indeed, in their brief in the District Court on the disclosure issue (Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Compel Answers to Interrogatories), defendants themselves conceded the materiality of the "same line of business" inquiry, for in their own view Congress intended that an employer is an "interested employer" when he is "in the same line of business." As defendants put it (at p. 7):

> "The legislative history of § 101(a)(4) shows, therefore, that Congress, particularly the Senate, envisioned a union member's lawfully securing assistance to sue his union from anyone except an employer whose own activities or economic interests were in the same line of business as the employer whose union member employees were in litigation."

ii. A second key line of inquiry plaintiffs would pursue with the sample of the contributing employers' names is whether the employers have any relationship with the unions who are defendants in the Foundation-financed employee suits. As we have shown (supra, pp. 7-8), in precipitating the change on the Senate floor from the original "no employer" to the ultimate "no interested employer" terminology, Sen-

ator Goldwater had initially offered an amendment which the sponsors found too restrictive and rejected. But significantly, even Senator Goldwater's proposed amendment would have applied the bar of the proviso to any employer who has a "dispute, controversy, contract, connection, or relationship of any kind in any area of activity . . ." with the labor organization being sued. Plaintiffs plan to show upon disclosure of 190 employer identities that many of the Foundation's employer contributors have contracts or other relationships with one of the plaintiff unions being sued with Foundation financing, clearly invoking the Congressional intent that an employer with any kind of relationship to a union defending a member's suit is barred by the proviso from financing that suit.

iii. A third key inquiry plaintiffs would pursue is whether contributing employers have union security contracts. Almost all the Foundation-financed employee suits seek to invalidate or curtail agency shop or other union security agreements. Employers with union security agreements obviously have an immediate economic "interest" in test suits which seek to invalidate or limit such agreements. It is the nub of the Seventh Circuit's ruling in *Adamszewski* v. *Local 1487, Machinists,* 496 F.2d 777, 784 (1974), cert. denied, 95 S.Ct. 311, that *"a practical business interest in the suit"* meets the financing ban of the proviso. Plaintiffs desire disclosure of employer donors' names to meet this pragmatic test of employer interest.

iv. A fourth area of inquiry is whether employers supporting the Foundation are also supporting the defendant Committee, because the Committee is demonstrably engaged in a variety of directly anti-union activities, including the use of anti-union and anti-strike

motion pictures (Plaintiffs' Answers to Set Number I of Interrogatories, answer 8, at pp. 22-23), literature (tr. 291, 317, *et seq.*) and even direct lobbying against such measures as the extension of the National Labor Relations Act to agricultural workers (tr. 364).[2]

v. A fifth significant line of inquiry plaintiffs desire to pursue upon identification of a sample of the employer donors to the Foundation concerns other anti-union activities of the contributing employers, which may underscore the basis of their donations to the Foundation.

6. *Proceedings on Plaintiffs' Discovery Motion.* Defendants extensively briefed their opposition to the disclosures sought. Oral argument was had, and on June 5, 1974, the District Court entered an Order (Pet. 9A-10A) compelling defendants to furnish the names sought, under the litigation confidentiality restriction which plaintiffs had included in their proposed order.

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[2] The United Farm Workers have become a special target of defendants' attack in every possible forum. The Foundation has financed four lawsuits against the Union, which it has exploited in literature calculated to convince employees not to organize (see Complaint, pp. 10-12; Appendix M to Plaintiffs' Answers to Set Number I of Interrogatories by Defendants). Meanwhile the Committee formed a California affiliate (Californians for Right to Work); together they have promoted and financed anti-Chavez meetings, press releases, picketing, speeches, newsletters, and a book (see tr. 394-399, 435, 573-589; Hearings before the Subcommittee on Migratory Labor, Senate Committee on Labor & Public Welfare, 91st Cong. 1st Sess. (1969), pp. 583-86; Complaint, Attachment B4, p. 2; Appendices J and K to Plaintiffs' Answers to Set Number I of Interrogatories by Defendants). Most revealing of the defendants' campaign against the UFW is the recent disclosure that during the grape boycotts by the United Farm Workers the Committee distributed "BUY GRAPES" bumper stickers (*The Wall Street Journal*, April 22, 1975, pp. 1, 22).

As the District Court made clear in its order of June 20, 1974, refusing to certify the case to the Court of Appeals (Pet. 11A-13A), the central question presented is governed by the ruling of the Court of Appeals in *Carey* v. *Hume*, 492 F.2d 631 (C.A.D.C., 1974), *cert. dismissed*, 417 U.S. 938, that the First Amendment is not an absolute barrier to the compelled disclosure of material evidence necessary to litigation of the issues. The District Court emphasized (Pet. 12A) that the information plaintiffs here seek "goes to the heart of this litigation," that plaintiffs had "demonstrated good cause for obtaining the necessary information," and that "there is no other reasonable way for Plaintiffs to obtain the information sought."

7. *Proceedings in the Court Below.* On June 27, 1974 defendants filed in the Court of Appeals an appeal and a petition for writ of mandamus to review the District Court's discovery order. On June 28, 1974 the Court of Appeals issued an order dismissing the appeal and this Court denied review thereof on January 20, 1975 (95 S.Ct. 817). On March 17 the Court of Appeals issued its detailed opinion dismissing the petition for writ of mandamus, and on April 14 this Court unanimously (Mr. Justice Douglas not participating) denied petitioners a stay to permit filing of their petition for review. The stay of the District Court's disclosure order of June 5, 1974 having expired on April 14, defendants' compliance was required within the prescribed fifteen days thereafter, but defendants have not yet complied. We submit that this Court's denial of the stay should appropriately be followed by denial of the petition, in view of the absence of a plausible basis for petitioners' ob-

jections to furnishing vital evidence, the careful and considered opinions below, and the earlier unsuccesful petition to review the same District Court order.

REASONS FOR DENYING THE WRIT

Nothing is presented in the petition which was not before the Court when it denied the prior petition last January, and again when it denied the stay on April 14. In this brief presentation we refute once more petitioners' objections to furnishing material evidence under conditions of litigation confidentiality, and we show that the court below properly refused to exercise extraordinary mandamus jurisdiction to interfere with the District Court's order.

I. Petitioners' First Amendment Objection To Disclosure Is Unfounded, Since The Information Required To Be Furnished To Plaintiffs Goes To The Heart Of The Issue For Trial

The District Court expressly found that the information sought from defendants goes to the heart of plaintiffs' case, and the court below has properly declined interlocutory interference with the District Court's order. Petitioners are quite mistaken in suggesting that *NAACP* v. *Alabama,* 357 U.S. 449, bars identification of a sample of their employer contributors, since such identification is necessary for trial of the central question whether they are violating the "interested employer" ban of the federal statute. Only last year in *California Bankers Association* v. *Shultz,* 416 U.S. 21, 55, this Court emphasized that the *NAACP* v. *Alabama* principle bans compelled disclosure of organizational affiliation only "*absent a countervailing governmental interest*" which justifies disclosure. This Court (at pp. 55-56) reminded that its cases "do not elicit a

per se rule that would forbid such disclosure in a situation where the governmental interest would override the associational interest in maintaining such confidentiality."

The necessary "governmental interest" clearly exists where a party in a civil litigation genuinely needs the information sought for trial of his cause and particularly where, as here, the suit seeks to enforce a federal statute's prohibition. The Second Circuit's ruling requiring disclosure of First Amendment-privileged facts in a private libel action in *Garland* v. *Torre,* 259 F.2d 545, *cert. denied,* 358 U.S. 910, was cited with approval by this Court in *Branzburg* v. *Hayes,* 408 U.S. 665, 686. To like effect was the 1974 ruling by the court below in *Carey* v. *Hume,* 492 F.2d 631, *cert. dismissed,* 417 U.S. 938. There the opinion by Judge McGowan analyzed this Court's relevant authorities (including *Branzburg*) and concluded that evidence necessary for proof of a plaintiff's civil libel action is not shielded by the First Amendment from compulsory disclosure. On May 28, 1974 this Court decided 6-3 to refuse a stay of the *Carey* ruling, and subsequently the petition for certiorari was dismissed (417 U.S. 938).

Thus it is clear that the First Amendment does not insulate from discovery the material evidence needed by a party in civil litigation. Accordingly, there is no merit to petitioners' insistence on concealment of evidence which will show that their employer supporters, who are financing through the Foundation and the Committee suits by dissident union members challenging union support requirements, are "interested" in those suits within the meaning of the LMRDA prohibition. Indeed, defendants have never really sought to refute the five separate forms of employer interest

which plaintiffs informed the District Court they intend to show upon production of the sample of the contributing employers' names (see *supra*, pp. 10-12). Unable to answer plaintiffs' material need for the information, petitioners have instead sought by their mandamus attack on the discovery order to raise a variety of merits issues for interlocutory appellate review. We proceed to demonstrate that the Court below properly rejected petitioners' strained effort to appeal such issues before a trial of the case.

II. The Court Below Properly Refused To Resolve by Mandamus Petitioners' Various Merits Contentions

Petitioners seek to avoid furnishing to plaintiffs highly material evidence for the trial of the case by advancing at this interlocutory stage a variety of merits contentions. Each of their contentions is plainly erroneous, and the Court of Appeals properly refused to decide them in advance of a trial by means of the mandamus power appropriately invoked only to cure egregious and jurisdictional errors.[3]

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[3] In addition to the four points on which the Court of Appeals ruled against them, petitioners now urge a new contention (Pet. 16) to the effect that plaintiffs should have shown "illegal Foundation activity" before obtaining any employers' names by discovery. We find it difficult to understand this contention in view of defendants' concession that at least six hundred thousand dollars a year comes to the Foundation from employers and that no less than 84% of the Committee's annual support comes from business donors. Surely there is nothing to petitioners' insistence (Pet. at 14) that plaintiffs must prove that the piper is calling the tune—that the employers, who are financing through the Foundation the employees' suits challenging union support requirements, control Foundation activities. Since it is admitted that the employer monies are used to finance the employees' suits, every condition of the statute's prohibition on "*direct or indirect*" employer finance-

For instance, petitioners asserted that the District Court lacks jurisdiction of the action. The Court of Appeals properly declined interlocutory resolution of that challenge in a case where District Court jurisdiction is supported by the principle that express statutory rights are subject to judicial vindication and by the unequivocal jurisdictional grant in § 102 of the Act. See District Court opinion, 366 F. Supp. 46. Similarly erroneous and premature is petitioners' contention that the statute should be construed to prohibit "interested employer" financing only of those suits by union members which assert rights under Title I of LMRDA. There is neither statutory text nor legislative history to support such a restriction; and actually a number of suits being financed by the defendants *do* assert claims under Title I of LMRDA (see Pet. p. 13, n). And as concerns petitioners' claim that the "interested employer" prohibition of the statute should be limited to the immediate employer of the union member suing his union, once again the Court of Appeals properly declined to undertake the constructional task upon a mandamus petition against a discovery order, where the entire Senate debate (see *supra,* pp. 7-8) makes clear that petitioners' confining construction is as much repelled by the legislative history as it is by the statutory terminology. Indeed, in the District Court defendants themselves disavowed the "immediate employer" limitation (see *supra* p. 10) and they continue to adhere to this disavowal (see Pet. p. 10, n.).

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ing is already conceded, leaving only the question whether the contributing employers are "interested" within the meaning of the statute. It is hard to conceive what other evidence of "illegal" action plaintiffs should have shown in advance of discovery, where all that remains in dispute is the 'interested" issue and defendants insist on concealing the material evidence which will help to prove the interests of the contributing employers.

Finally, petitioners are also clearly premature in their request that under *NAACP* v. *Button*, 371 U.S. 415, the court below now construe the statute as constitutionally inapplicable to their activities. As recognized below (see Pet. 24A), this Court has emphasized since *Borden's Co.* v. *Baldwin*, 293 U.S. 194, 212, that before constitutional challenges are to be resolved, "the facts essential to their decision should be definitely found by the lower courts upon adequate evidence." Applied again in *United States* v. *Auto Workers*, 352 U.S. 567, 591, the rule was more recently invoked in *Askew* v. *Hargrave*, 401 U.S. 476, 479, where this Court emphasized that the constitutional claim "should not be decided without fully developing the factual record at a hearing." At this juncture defendants' merits attack on the statute as applied is not yet resolvable. And surely they cannot make that attack the basis for concealing the very information disclosing that their contributing employers have economic interests which validly invoke the statute's prohibition on back-door employer financing of dissident union members' suits promoting the employers' interests.[4]

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[4] Unlike the doubtful "state interest" advanced in *Button*, Congress in forbidding interested employers to finance dissident members' suits has applied a bedrock labor law principle banning employer interference in the relations between a union and the employees it represents. That principle was first embodied in the Erdman Act in 1898 (30 Stat. 424) prohibiting the "yellow dog contract" which had required employees not to become union members. The Railway Labor Act of 1926 established that employers "have no constitutional right to interfere with the freedom of the employees in making their selections" of union representatives. *Texas & N.O.R. Co.* v. *Ry. Clerks*, 281 U.S. 548, 571. Strengthening provisions adopted in 1934 were upheld by the ruling in *Virginian Ry. Co.* v. *System Federation*, 300 U.S. 515 which enjoined a carrier from "interfering with, influencing or coercing its shop craft em-

It is thus clear that petitioners cannot use mandamus against a discovery order to resolve in mid-stream their various and dubious merits defenses, particularly where the District Court's discovery order was eminently proper and correct in view of the high materiality of the information sought under conditions of litigation confidence. But before concluding we must note that even if that order were less obviously correct, it would not follow that the Court of Appeals was required to invoke the extraordinary mandamus power designed to correct egregious and jurisdictional errors. Recently the court below emphasized in another case that the availability of mandamus for such cases *"can not be permitted to authorize an* ad hoc *judgment on each mandamus petition to determine whether an exemption from the final judgment rule is warranted on the parti-*

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ployees" in their union activities (at 538). Stringent protections were incorporated in the 1932 Norris-LaGuardia Act, which declared (29 U.S.C. § 102) that employees "shall be free from the interference, restraint, or coercion of employers of labor, or their agents . . ." The 1935 National Labor Relations Act expressly preserves workers' rights to union organization against all forms of employer interference or coercion (29 U.S.C. § 151), and this Court recognized that "coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority." *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1, 33. The Act (§ 158 (a)(2)) also forbids an employer to "interfere with the formation or administration of any labor organization or contribute financial or other support to it." This Court has emphasized that the statute embodies the policy "to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence." *Machinists* v. *Labor Board*, 311 U.S. 72, 80. See also *Labor Board* v. *Borg-Warner*, 356 U.S. 342. Amendments adopted in 1947 forbid (29 U.S.C. 186(a)) an employer from giving "any money or other thing of value to any representative of any of his employees;" in 1959, as part of the LMRDA provisions which included the proviso here in issue, the prohibition was extended to cover employer associations, labor relations experts, and any person or association "who acts in the interest of an employer" (*id.*).

cular facts." *Colonial Times, Inc.* v. *Gasch*, — F.2d — (C.A.D.C., Jan. 3, 1975, slip op. p. 11). For that conclusion the court (*id.*) provided the following presently pertinent comment:

> Such a practice would be subversive of the very policy of the final judgment rule since every litigant would feel that his case is just such an exemption. Thus, this Court, even if it dismissed these potentially frivolous mandamus petitions, would be forced to expend the effort which it is the purpose of the final judgment rule to avoid. The final judgment rule is effective only if it deters mandamus petitions in the first place. So if there are to be exemptions to the final judgment rule, those exemptions should be indulged only in clearly and narrowly defined areas to maintain the wholesome deterrence of the final judgment rule.
>
> Errors of the sort traditionally cognizable by mandamus are those which result from the District Court acting outside its "jurisdiction"... The concept of legal power to act implies not only a limitation on the type of error cognizable in mandamus (*i.e.*, whether the court merely abused its discretion or instead acted in a manner in which it had no discretion to act) but also on the *class* of errors so cognizable. Despite a non-technical view of "jurisdictional" errors, there is surely a class of errors which are, no matter how egregious, not "jurisdictional" and not within the class of errors cognizable in mandamus. As a general proposition, discovery orders are not jurisdictional and thus may not be reached under traditional concepts of mandamus except in the most extraordinary circumstances.[5]

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[5] Contrary to petitioners' claim (Pet. 22), there is no conflict between the refusal of the court below to upset the District Court's appropriate discovery order in this case and four isolated circuit court decisions which have allowed mandamus in a variety of circumstances where excessive and unnecessary disclosures had been

CONCLUSION

A year ago plaintiffs informed the District Court (Tr. of Arguments, May 2, 1974, p. 3) that upon completion of the outstanding discovery they would be ready for trial of the case later in 1974. Defendants' interlocutory mandamus tactic has now delayed the proceedings by another year. We urge that without further obstructing delay the case be permitted to proceed to a trial of the substantive issues.

For the reasons stated it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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ordered by trial courts. Nor is there the slightest resemblance between this case and *Schlagenhauf*, which presented a genuine general issue of federal procedure. By contrast, the only possible question of general import in this case is whether a defendant in a civil suit may withhold evidence which goes to the heart of plaintiffs' case. The question answers itself, and provides no basis for a mandamus in the same Court of Appeals which fully resolved that very question in 1974 in its *Carey* ruling.